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No. 93-305

In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM C. BLANKSTYN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a notice of deficiency mailed by the Internal Revenue Service to the taxpayer's last known address (pursuant to Section 6212 of the Internal Revenue Code, 26 U.S.C. 6212), but which is allegedly not received by the taxpayer due to Postal Service error, commences the 90-day period provided by Section 6213 of the Code, 26 U.S.C. 6213, within which the taxpayer may file a petition in the Tax Court for redetermination of the deficiency.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1-A3) and the Tax Court (Pet. App. A7-A9, A11-A14) are unreported. The decision of the court of appeals is noted at 990 F.2d 1255 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. A1-A3) was entered on March 19, 1993. The petition for rehearing was denied on June 4, 1993. Pet. App. A5. The petition for a writ of certiorari was filed on August 25, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 26, 1990, the Internal Revenue Service (IRS) mailed petitioner a notice of deficiency for his 1985 federal income taxes (Pet. App. A2, A8, A13). The notice was mailed by certified mail to petitioner's last known address (*ibid.*). Petitioner alleges that he did not receive the notice because it was mishandled by the Postal Service (*id.* at A8, A11).

After the United States assessed petitioner's taxes for 1985, petitioner brought suit in district court seeking to enjoin the IRS from levying on his property or otherwise seeking collection of the assessment. The district court rejected petitioner's request for injunctive relief, and the court of appeals affirmed. The decision in that case is now pending on petition for writ of certiorari. *Blankstyn* v. *United States*, No. 93-209.

2. On July 15, 1991, petitioner filed a petition in the Tax Court to obtain a redetermination of the 1985 deficiency. The Tax Court dismissed the petition for lack of jurisdiction. The court ruled (Pet. App. A8-A9) that the notice of deficiency had been properly mailed by certified mail to petitioner's last known address and that petitioner had failed to file his petition within 90 days of the mailing of the notice, as required by Section 6213(a) of the Code, 26 U.S.C. 6213(a). The court concluded that a notice of deficiency properly sent to petitioner by certified mail at his last known address is effective notwithstanding an assertion that it was not received due to alleged mishandling by the Postal Service (Pet. App. A13-A14).

3. The court of appeals affirmed. The court noted that the mailing of a properly addressed deficiency notice commences the 90-day period for filing a petition in the Tax Court under the plain language of the statute, without regard to whether the notice was received (Pet. App.

A3). The court therefore concluded that the 90-day period in petitioner's case began on March 26, 1990, when the notice of deficiency was properly mailed to him by certified mail at his last known address, and expired 90 days later on June 26, 1990 (*id.* at A2-A3). The Tax Court therefore correctly dismissed the petition as untimely (*ibid.*).

ARGUMENT

1. Section 6213 of the Internal Revenue Code requires that a petition for redetermination of a tax deficiency must be filed with the Tax Court within 90 days after the notice of deficiency is "mailed." 26 U.S.C. 6213(a). Section 6212 of the Code provides that a notice of deficiency may be sent to a taxpayer "by certified mail or registered mail." 26 U.S.C. 6212(a). To provide a uniform and predictable method for issuing these notices, Congress further specified in Section 6212 that a notice, "if mailed to the taxpayer at his last known address, shall be sufficient" (26 U.S.C. 6212(b)(1)).

Applying the plain language of this statute, the courts of appeals have generally held that a notice of deficiency properly mailed to the taxpayer's last known address by certified or registered mail is valid without regard to whether the taxpayer actually received it. *Williams* v. *Commissioner*, 935 F.2d 1066, 1067 (9th Cir. 1991); *King* v. *Commissioner*, 857 F.2d 676, 681 (9th Cir. 1988); *Keado* v. *United States*, 853 F.2d 1209, 1212 (5th Cir. 1988); *Morse* v. *Commissioner*, 635 F.2d 701, 703 (8th Cir. 1980); *Rappaport* v. *United States*, 583 F.2d 298, 301 (7th Cir. 1978). See also *Berger* v. *Commissioner*, 404 F.2d 668, 673 (3d Cir. 1968), cert. denied, 395 U.S. 905 (1969). Applying this rule, the court of appeals properly rejected petitioner's claim in this case. The uncontroverted evidence demonstrated that the IRS mailed the notice of deficiency to petitioner by certified mail, properly addressed

to him at his last known, and correct, address (Pet. App. A2, A8, A13).

2. Petitioner asserts (Pet. 9) that he did not receive the notice of deficiency because it was mishandled by the Postal Service. He claims that, under decisions in other circuits, the notice of deficiency was therefore invalid. *Id.* at 10, citing *Powell* v. *Commissioner*, 958 F.2d 53 (4th Cir.), cert. denied, 113 S. Ct. 440 (1992); *McPartlin* v. *United States*, 653 F.2d 1185 (7th Cir. 1981); and *Keado* v. *United States*, 853 F.2d 1209 (5th Cir. 1988).

In *McPartlin*, the court stated that "[w]hen evidence indicates that a notice of deficiency has not been received by the taxpayer due to error of the Postal Service, the notice shall be found insufficient." 653 F.2d at 1188. As other courts have recognized, however, that statement was dictum because the court concluded in *McPartlin* that the IRS had *not* sent the notice of deficiency to the taxpayer's "last known address" as required by Section 6212 (653 F.2d at 1187, 1190). See *Keado* v. *United States*, 853 F.2d at 1212 n.9. As we acknowledged in the government's petition for a writ of certiorari in the *Powell* case (92-452 Pet. 11 n.12), the decision in *McPartlin* thus does not afford a basis for concluding that a conflict among the circuits exists on this issue.

Petitioner's reliance on *Keado* is clearly misplaced. In that case, the Fifth Circuit rejected the argument made by petitioner here. 853 F.2d at 1211-1212, 1218-1219. The court further noted that the Seventh Circuit's dictum in *McPartlin* was inapplicable to the facts before the court in that case. *Id.* at 1212 n.9.[1]

[1] Petitioner's reliance (Pet. 11) on *Pyo* v. *Commissioner*, 83 T.C. 626 (1984), *Mulvania* v. *Commissioner*, 81 T.C. 65 (1983), and *Estate of McKaig* v. *Commissioner*, 51 T.C. 331 (1968), is misplaced. In two of those cases, the notice of deficiency did not comply with the statute because it was "sent to the wrong address." *Mulvania* v. *Commissioner*, 81 T.C. at 70. See also *Pyo* v.

It is true that the Fourth Circuit stated in *Powell* v. *Commissioner* that if "the notice was admittedly not delivered to the taxpayers because of an error of the Postal Service * * * that is sufficient proof on the part of the taxpayers that the notice was insufficient." 958 F.2d at 56. It is no longer clear, however, that *Powell* is accepted as a correct statement of the law in the Fourth Circuit. In *Balkissoon* v. *Commissioner*, 995 F.2d 525 (1993), the Fourth Circuit endorsed the generally accepted rule that a notice of deficiency is "sufficient" if it is mailed to the taxpayer's last known address (*id.* at 528):

> Section 6212(a) does not require that the taxpayer actually receive the notice of deficiency. Instead, the Commissioner must show only that it sent a notice by registered or certified mail to the taxpayer's last known address.

The court emphasized that this "statutory scheme * * * provides a method of notification which insures that the vast majority of taxpayers will be informed that a tax deficiency has been determined against them without imposing on the Commissioner the virtually impossible task of proving that the notice actually has been received by the taxpayer." *Ibid.*, quoting *Jones* v. *United States*, 889 F.2d 1448, 1450 (5th Cir. 1989). Even though *Powell* was cited to the court in the *Balkissoon* case, the Fourth Circuit applied the generally accepted rule that a notice of deficiency is sufficient if it is "mail[ed] to the taxpayer's last known address" (26 U.S.C. 6212(b)(1)) even if

Commissioner, 83 T.C. at 639. In *Estate of McKaig* v. *Commissioner*, 51 T.C. at 336, in stating that the Commissioner "should have known something was wrong" when the notice was returned undelivered, the court emphasized "that there [was] considerable doubt as to whether" the Commissioner had sent the notice to the correct address, as the statute requires. *Ibid.*

the taxpayer did not "actually receive" it. 995 F.2d at 528.

3. There is no merit in petitioner's additional contention (Pet. 13) that the 90-day period for filing a petition for redetermination of the deficiency runs only from the date that the notice was actually received. The statute clearly provides that the 90-day period commences on the date that the notice is "mailed" by the IRS. 26 U.S.C. 6213(a).

Petitioner errs in asserting (Pet. 13) that *Tenzer* v. *Commissioner*, 285 F.2d 956 (9th Cir. 1960), holds to the contrary. In *Tenzer*, the court found that the IRS had "abandoned" a deficiency notice that had been mailed to the taxpayer, but never received, because the IRS thereafter elected to effect personal service of the notice on the taxpayer. *Id.* at 956, 958. While the court held in *Tenzer* that a new 90-day period for the filing of a petition for redetermination commenced because of that "abandonment," the court acknowledged that the first notice, which had been "correctly addressed, registered and mailed," was "not wholly void" and "was probably good enough to arrest the statute of limitations" (*id.* at 958). In subsequent decisions, the Ninth Circuit has not derived from *Tenzer* any general rule that the 90-day period is to be dated from the receipt of the notice rather than from its mailing.[2] To the contrary, the Ninth Circuit has consistently applied the general rule that a notice of deficiency properly mailed to a taxpayer's last known address is valid without regard to whether the taxpayer actually received it. See, *e.g.*, *Williams* v. *Commissioner*, 935 F.2d at 1067; *Wilson* v. *Commissioner*, 564 F.2d 1317, 1319 (9th Cir. 1977), cert. denied,

[2] In the decision in *Tenzer* itself, the court acknowledged that it was open to "the charge * * * that we take liberties with the statute." 285 F.2d at 958.

439 U.S. 832 (1978); *Boren* v. *Riddell*, 241 F.2d 670, 672 (9th Cir. 1957).

Nor does the decision in the present case conflict with the Seventh Circuit's holding in *McPartlin* v. *Commissioner* that, when a "notice of a deficiency is not sent to the taxpayer's 'last known address,' subsequent actual notice of the determined deficiency will commence the running of the 90 day period." 653 F.2d at 1192. The Seventh Circuit emphasized in *McPartlin* that its holding was "based solely upon the peculiar facts and circumstances of this case." *Id.* at 1193. The principal difference between the facts of *McPartlin* and of the present case is that the deficiency notice in *McPartlin* was mailed to an address that was *not* the taxpayer's "last known address." See *id.* at 1187, 1190. In the present case, the deficiency notice was indisputably "mailed" to petitioner's "last known address." Under the plain language of the statute, the 90-day period for filing his petition in Tax Court commenced on the date that the notice was thus properly "mailed" to petitioner (26 U.S.C. 6213(a)). Because the Tax Court petition was filed long after that 90-day period expired, the court of appeals correctly held that it was untimely.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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